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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

EDUVIGIS DIAZ, Plaintiff and Appellant, v. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY et al., Defendants and Respondents.	B206259 (Los Angeles County Super. Ct. No. LC075998) ORDER MODIFYING OPINION (NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on July 20, 2009 be modified as follows:

1. On page 3, at the end of footnote 2, replace the period with a semicolon and add the following citation within the parentheses:

see Evid. Code, § 646.

2. On page 7, the first full paragraph is deleted and the following two paragraphs are inserted:

> Here, the question of negligence was a close one. Artero and Forero offered markedly different accounts of the accident and who was at fault. Although the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence (Evid. Code, § 646, subd. (b)) and the presumptive effect of the doctrine vanishes if, as here, the defendant produces evidence that would support a finding the defendant was not negligent (see Evid. Code, § 604), a properly instructed jury still could have drawn the inference the accident was caused by MTA's negligence based on the evidence that established Diaz's

entitlement to the initial presumption. (Evid. Code, § 646, subd. (c);[8] see also Cal. Law Revision Com. com., 29B, Pt. 2 West's Ann. Evid. Code (1995 ed.) foll. § 646, p. 198 [Even if the defendant comes forward with evidence rebutting the presumption, "the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. [Citations.] In rare cases, the defendant may produce such conclusive evidence that the inference of negligence is dispelled as a matter of law. [Citation.] But, except in such a case, the facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared."].)

Because such an inference of negligence would be proper on the facts of this case, the court's failure to instruct the jury on res ipsa loquitur deprived Diaz of a significant advantage at trial. Under such circumstances, it cannot be said that failure was harmless. (See *Bedford v. Re* (1973) 9 Cal.3d 593, 601 [when question of negligence is close and res ipsa loquitur instruction is warranted, "it cannot be said that the trial court's failure to give a res ipsa loquitur instruction

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8 Evidence Code section 646, subdivision (c), provides, "If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that: [¶] (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and [¶] (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

was harmless"]; *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420, 432 [where it is reasonably probable that, had res ipsa loquitur instruction been given, plaintiff would have prevailed on the question of negligence, failure to give the instruction is reversible error].)[9]

There is no change in the judgment.

PERLUSS, P. J. ZELON, J. JACKSON, J.

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9 Diaz also contends the verdict is not supported by substantial evidence. In light of our holding reversing the judgment, we do not reach that contention. In addition, because the circumstances surrounding Dr. Amos's testimony may not recur at all in the next trial, or in the same form as in this record, we also decline to address Diaz's contention concerning the court's admission of Dr. Amos's testimony.